CHAN SOON GUAN & ANOR A

v.

ISMAIL HJ ADNAN

COURT OF APPEAL, PUTRAJAYA B
KN SEGARA JCA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: J-02-70-2006]
4 AUGUST 2010 C

LIMITATION: *Land, recovery of - Whether action time barred - Filing of suit 17 years after knowledge of alleged conspiracy and fraud - Whether cause of action time barred by s. 9 of the Limitation Act 1953*

CIVIL PROCEDURE: *Limitation - Cause of action - When cause of action commenced - Whether caught by statutory limitation for actions based on contract - Limitation Act 1953, s. 6* D

The respondent's (plaintiff's) claim in the High Court against the appellants (defendants) was principally for a declaration that the E transfer of two landed properties ('the said lands'), was null and void; and for an order that the defendants hand over the title deeds and effect a transfer of the said lands to the plaintiff free of any encumbrances. The trial judge found, on a balance of probabilities, that the transaction between the plaintiff and the F defendants was a loan transaction, thus the transfer of the said lands was null and void. The trial judge ordered the second defendant to effect a registrable transfer of the said lands to the plaintiff. The defendants' appeal was grounded on these grounds (i) that the plaintiff's claim, being a claim for recovery of land, was G time barred under s. 9 of the Limitation Act 1953 and (ii) that even if there was proved to be a loan agreement, the cause of action in favour of the plaintiff would commence from late 1979 or early 1980 and it would also be time barred under s. 6 of the Limitation Act as the present action was only filed on 18 January H 1997.

Held (allowing the appeal)
Per KN Segara JCA delivering the judgment of the court:

I

(1) The suit that was the subject of appeal herein ('the second suit') was filed in effect 17 years after the plaintiff first knew of the alleged conspiracy and fraud of the defendants and 14

years after the commencement of the first suit, which the plaintiff failed to prosecute and the court had struck off the same on 8 July 1993. Pursuant to s. 9 of the Limitation Act, no action can be brought to recover any land after the expiration of 12 years from the date on which the right of action accrued. In the present appeal herein, the plaintiff admitted that in late 1979 or early 1980 he had become aware that the said properties were transferred to the second defendant. This was the material date upon which the plaintiff's cause of action arose to recover the said lands. Further, pursuant to s. 6 of the Limitation Act, the plaintiff's cause of action arose from the same date referred to above (*ie*, late 1979 or early 1980) but limited to a period of six years. The plaintiff's second suit was caught by statutory limitation for actions based on contract under s. 6 of the Limitation Act as well as statutory limitation recovery of land (based on fraud or otherwise) under s. 9 of the same Act. Hence, the plaintiff's causes of action, if any, were barred by the Limitation Act. (paras 10-14)

Bahasa Malaysia *Translation Of Headnotes*

Permohonan responden (plaintif) di dalam Mahkamah Tinggi terhadap perayu-perayu (defendan-defendan) terutamanya adalah untuk satu deklarasi bahawa pindah milik dua hartanah ('hartanah-hartanah tersebut'), adalah batal dan tak sah; dan untuk satu perintah bahawa defendan-defendan harus menyerahkan suratikatan hakmilik dan melaksanakan satu pindah milik tanah-tanah tersebut kepada plaintif tanpa bebanan-bebanan. Hakim bicara mendapati, atas imbangan kebarangkalian, bahawa transaksi antara plaintif dan defendan-defendan adalah transaksi pinjaman, oleh itu pindah milik tanah-tanah tersebut adalah tidak sah dan terbatal. Hakim bicara membuat perintah untuk defendan kedua melaksanakan satu pindah milik yang boleh didaftarkan bagi tanah-tanah tersebut kepada plaintif. Rayuan defendan-defendan berdasarkan alasan-alasan ini (i) permohonan plaintif, iaitu tuntutan mendapat kembali tanah, adalah dihadkan oleh masa di bawah s. 9 Akta Had Masa 1953 dan (ii) walaupun persetujuan pinjaman mungkin dibuktikan,

kausa tindakan yang berpihak kepada plaintif bermula dari akhir tahun 1979 atau awal tahun 1980 dan ia juga dihadkan oleh masa di bawah s. 6 Akta Had Masa kerana tindakan ini hanya difailkan pada 18 Januari 1997.

Diputuskan (membenarkan rayuan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Guaman yang menjadi subjek rayuan di sini ('guaman kedua') telah difailkan pada dasarnya 17 tahun selepas plaintif mendapat pengetahuan mengenai dakwaan konspirasi dan penipuan defendan-defendan dan 14 tahun selepas permulaan guaman pertama, yang plaintif gagal untuk mendakwa dan ditolak oleh mahkamah pada 8 Julai 1993. Di bawah s. 9 Akta Had Masa 1953, tiada tindakan boleh diambil untuk mendapatkan kembali tanah selepas penamatan 12 tahun dari tarikh di mana hak tindakan mula terakru. Di dalam rayuan ini, plaintif mengakui bahawa pada akhir tahun 1979 dan awal tahun 1980 beliau memang sedar bahawa tanah-tanah tersebut telah dipindah milik kepada defendan kedua. Ini adalah tarikh material di mana kausa tindakan plaintif berbangkit untuk mendapatkan kembali tanah-tanah tersebut. Seterusnya, di bawah s. 6 Akta Had Masa, kausa tindakan plaintif berbangkit dari tarikh yang sama seperti di atas (iaitu akhir tahun 1979 dan awal tahun 1980) tetapi dihadkan pada tempoh 6 tahun. Guaman kedua plaintif telah terangkum oleh had-had statutori bagi tindakan-tindakan berdasarkan kontrak di bawah s. 6 Akta Had Masa dan juga oleh had-had statutori mendapatkan kembali tanah (berdasarkan penipuan atau sebaliknya) di bawah s. 9 Akta yang sama. Oleh itu, kausa-kausa tindakan plaintif, jika ada, dihadkan oleh Akta Had Masa.

Legislation referred to:
Limitation Act 1953, ss. 6, 9

For the appellant - T Jayadeva; M/s Syarikat Radhakrishnan
For the respondent - Mohaygen Naing; M/s Mohaygen, Dora & Partners

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-25-1997]

Reported by Suhainah Wahiduddin

A

JUDGMENT

KN Segara JCA:

[1] The respondent's (plaintiff's) claim in the High Court against the appellants (defendants) was principally for a declaration that the transfer of two landed properties known as EMR 2745 Lot No. 3895 and EMR 4295 Lot 2033 in Mukim XII, Sg Kluang, Rengit, Batu Pahat, Johor (the said lands), is null and void; and for an order that the defendants do hand over the title deeds and effect a transfer of the said lands to the plaintiff free of any encumbrances.

[2] The trial judge found, on a balance of probabilities, that the transaction between the plaintiff and the defendants was a loan transaction. He thus found that the transfer of the said lands was null and void. The trial judge ordered the 2nd defendant to effect a registrable transfer of the said lands free from encumbrance and deliver the same, together with the original title deeds, to the plaintiff within 90 days from the date of the judgment (8 October 2004) and 60 days from the date of receipt of the sum of RM13,000 from the defendants.

[3] The defendants' appeal before us is grounded on two main grounds, namely:

(1) that the transaction between the parties was an outright sale transaction of the said lands and not a loan transaction;

(2) (a) that the plaintiff's claim, being a claim for recovery of land, is time barred under s. 9 of the Limitation Act 1953, as no action can be brought to recover land after the expiration of 12 years from the date on which the right of action accrued, ie, in late 1979 or early 1980, when the plaintiff became aware that the said lands were transferred to the 2nd defendant;

(b) that even if there is proved to be a loan agreement, the cause of action in favour of the plaintiff would commence from the same date, ie, late 1979 or early 1980, and, it would also be time barred under s. 6 of the Limitation Act as the present action Civil Suit 22-25-1997 was only filed on 18/1/1997.

[4] Briefly, the facts are as follows.

[5] The 1st defendant is the father of the 2nd defendant. Prior to 6 March 1979 the plaintiff was the registered owner of the said lands. On 6 March 1979 a transfer was effected in respect of the said lands in favour of the 2nd defendant, as a nominee of the 1st defendant.

[6] The defendants contend that the transfer was effected pursuant to an agreement for sale of the said lands between the plaintiff and the 1st defendant for a consideration of RM5,500, which had been paid in cash. This is reflected in the memorandum of transfer dated 6 January 1979 executed by the parties and attested by a solicitor.

[7] The 2nd defendant, as the registered owner of the said lands, had on or around 2 December 1979 encumbered the properties by a charge in favour of a financial institution, namely, Yupang Finance Sdn Bhd.

[8] The plaintiff contends that the title deeds of the said lands, together with the executed memorandum of transfer, were given by him to the solicitor as a security for a personal loan of RM5,500 that he received from the 1st defendant in cash in early 1978 and, to be repaid in one year. The plaintiff alleged at paras. 10 and 11 of the statement of claim that he became aware, sometime in 1979/1980, that the 1st and 2nd defendant had conspired and fraudulently effected a transfer of the said lands to the 2nd defendant on 6 March 1979 and, thereafter, on 2 December 1979 the said lands were charged to Yupang Finance Sdn Bhd. No particulars of the alleged fraud either by the 1st defendant or 2nd defendant were pleaded. The plaintiff asserts that he had lodged caveats over the said lands on 17 December 1980, after discovering that the said lands had been transferred into the name of the 2nd defendant.

[9] In 1983 the plaintiff had filed a suit *vide* Johore Bahru High Court Civil Suit No 152 of 1983 (the 1st suit) similar to the present suit, Civil Suit No: 22-25-1997 (2nd suit), against the same parties. It is to be noted that Yupang Finance Sdn. Bhd was never made a party by the defendant. The 1st suit was struck off on 8 July 1993 on the ground the plaintiff failed to attend court at the show cause hearing. The 1st suit was never re-instated at any time by the plaintiff.

[10] About four years after the 1st suit was struck off the plaintiff filed the 2nd suit which is the subject of appeal before us. The 2nd suit was filed in effect about 17 years after the plaintiff first knew of the alleged conspiracy and fraud of the defendants alluded to in paras. 10 and 11 of the statement of claim and 14 years after the commencement of the 1st suit, which the plaintiff failed to prosecute and the court had struck off the same on 8 July 1993.

[11] The reliefs claimed by the plaintiff in his statement of claim, apart from damages, relate to the remedy of cancellation of an alleged loan agreement, and, the combined discretionary reliefs of injunction and declarations in respect of recovery of land.

[12] Pursuant to s. 9 of the Limitation Act, no action can be brought to recover any land after the expiration of 12 years from the date on which the right of action accrued. In the present appeal before us, the plaintiff admits that in late 1979 or early 1980 he became aware that the said properties were transferred to the 2nd defendant. We are unanimous that this is the material date upon which the plaintiff's cause of action arose to recover the said lands. Further, in respect of the alleged loan agreement, assuming there is proved to be one, we are unanimous that pursuant to s. 6 of the Limitation Act, the plaintiff's cause of action arose from the same date referred to above (ie, late 1979 or early 1980) but limited to a period of six years.

[13] We are unanimous that the plaintiff's 2nd suit is caught by the statutory limitation for actions based on contract under s. 6 of the Limitation Act as well as the statutory limitation for recovery of land (based on fraud or otherwise) under s. 9 of the same Act. We are unanimous that the plaintiff's causes of action, if any, are barred by the Limitation Act.

[14] In the upshot, the appeal is allowed with no order as to costs. The order of the High Court judge is set aside. The deposit is refunded to the appellants.